UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil No. 96-1285
	)	(RCL)
BRUCE BABBITT, Secretary of the Interior, et al.	)	
	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' SECOND PHASE II MOTION FOR
PARTIAL SUMMARY JUDGMENT
(RE: FUNDS NOT DEPOSITED OR INVESTED PURSUANT TO
THE ACT OF JUNE 24, 1938)

Plaintiffs contend that the accounting in this action must include funds that were never received by the United States, such as funds paid directly by the lessee of an allotment to the allotment owner. Under the American Indian Trust Fund Management Reform Act of 1994 ("1994 Reform Act"), however, the Department of the Interior ("Interior") is obligated to account only for funds "held in trust by the United States . . . which are deposited or invested pursuant to the Act of June 24, 1938 (25 U.S.C. 162a)." 25 U.S.C. § 4011(a). For this reason, and the further reasons set forth in the attached Defendants' Memorandum in Support of their Second Phase II Motion For Partial Summary Judgment (Re: Funds Not Deposited or Invested Pursuant to The Act of June 24, 1938), Defendants are entitled to summary judgment that neither the 1994 Reform Act nor any other law requires Interior to perform an accounting in this Court for funds not actually held in trust and deposited or invested pursuant to the Act of June 24, 1938, such as funds paid directly from lessees to the allotment owners.

A proposed order is attached.

Dated: November 22, 2000

Respectfully submitted

LOIS J. SCHIFFER
Assistant Attorney General

CHARLES W. FINDLAY
Assistant Chief
PHILLIP A. BROOKS
DAVID F. SHUEY
Senior Counsel
BRIAN L. FERRELL
SARAH D. HIMMELHOCH
Trial Attorneys
Department of Justice
Environment & Natural Resources Division
General Litigation Section
P.O. Box 663
Washington, D.C. 20044-0663

OF COUNSEL:

Edith R. Blackwell
Department of the Interior
Office of the Solicitor

Walter Eccard
Department of the Treasury
Office of General Counsel

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil No. 96-1285
	)	(RCL)
BRUCE BABBITT, Secretary of the Interior, et al.	)	
	)	
	)	
Defendants.	)	
	)	

MEMORANDUM IN SUPPORT OF DEFENDANTS' SECOND PHASE II MOTION FOR PARTIAL SUMMARY JUDGMENT
(RE: FUNDS NOT DEPOSITED OR INVESTED PURSUANT TO THE ACT OF JUNE 24, 1938)

TABLE OF CONTENTS

LIST OF EXHIBITS

Plaintiffs contend that the accounting in this action must include funds that were never received by the United States, such as funds paid directly by the lessee of an allotment to the allotment owner. Under the American Indian Trust Fund Management Reform Act of 1994 ("1994 Reform Act"), however, the Department of the Interior ("Interior") is obligated to account only for funds "held in trust by the United States . . . which are deposited or invested pursuant to the Act of June 24, 1938 (25 U.S.C. 162a)." 25 U.S.C. § 4011(a). Therefore, on the plain language of the statute, Plaintiffs' contention must fail. Even if the plain language did not sufficiently answer this question, an examination of the structure of the 1994 Reform Act requires the same conclusion: Congress did not intend to impose accounting obligations upon Interior for funds never actually held in trust.

This conclusion is consistent with this Court's earlier ruling that the 1994 Reform Act requires "defendants to provide plaintiffs an accurate accounting of all money in the IIM trust held in trust for the benefit of plaintiffs, without regard to when the funds were deposited." Cobell v. Babbitt, --- F. Supp. 2d —, 1999 WL 1581470 * 1 (D. D.C. Dec. 21, 1999). If Defendants never received the monies (for instance, because they were paid directly to the allotment owners), they cannot be funds "held in trust" and "deposited" subject to the duties declared by this Court. For these reasons, Defendants are entitled to summary judgment that neither the 1994 Reform Act nor any other law requires Interior to perform an accounting in this Court for funds not actually held in trust and deposited or invested pursuant to the Act of June 24, 1938, such as funds paid directly from lessees to the allotment owners.

I. FACTUAL BACKGROUND

A. Plaintiffs Contend that Defendants Must Account for Funds that Were Never Held, Deposited, Invested, or Controlled by the United States

Plaintiffs explicitly contend that Defendants must account for funds never received or invested by Defendants. For instance, Plaintiffs answered "Yes," when Defendants asked whether "the Accounting [Plaintiffs] seek in this action encompasses income from Allotments that is or was paid directly from lessees to owners of the Allotment?" Plaintiffs' Supplemental Contention Answers on Behalf of Class to Defendants' Fourth Set of Interrogatories, Requests for Admission and Requests for Production Dated October 15, 1999, Response to Interrogatory 11 (Jan. 31, 2000).[1] Such a contention is relevant because, as described below, some allotment owners enter into leases, commonly known as "direct-pay" leases, that require payments be made directly to the allotment owner rather than to Defendants.

B. Procedural Posture of the Case

Since this Court's ruling upon the Phase I trial on December 21, 1999, Defendants have filed a number of motions in this Court and with the U.S. Court of Appeals for the District of Columbia. In very brief summary, there is a currently pending appeal that addresses the question of who determines the scope of and performs any historical accounting of the IIM accounts, i.e. whether the Court may define and perform such an accounting in the first instance or whether Defendants' decisions regarding an historical review of accounts is subject only to judicial review under the Administrative Procedure

[1]Plaintiffs' discovery responses were attached as Exhibit 3 to Defendants' First Phase II Motion for Partial Summary Judgment.

Act.

In addition, Defendants have filed a Motion for Partial Summary Judgment on Plaintiffs' Claims for an Historical Accounting (hereinafter "First Phase II Motion for Partial Summary Judgment"). In that motion, Defendants began to address the scope of the accounting required by the 1994 Reform Act. As demonstrated in that Motion, Defendants are entitled to summary judgment on Plaintiffs' claim for an historical accounting of the IIM accounts because to the extent the 1994 Reform Act imposes an obligation upon Defendants to address account activity that occurred before the passage of the Act, it does so only within the context of its requirement that Interior prospectively report accurate account information to beneficiaries. See 25 U.S.C. §§ 162a(d), 4011. Defendants are also entitled to summary judgment that Plaintiffs' claim to have balances "restated" or "corrected" to reflect amounts that should have been credited or earned is beyond this Court's jurisdiction.

Unquestionably, the pending appeal could moot both this Motion as well as the First Phase II Motion for Partial Summary Judgment. Nonetheless, given the Court's expressed intent to minimize the potential for delay in the resolution of this case by having the parties continue preparation for the next trial, Defendants make this Motion as the next in a series of motions intended to refine the issues to be addressed in that trial. Defendants are currently preparing at least one additional motion, but anticipate that further trial preparation will result in the identification of additional legal issues that would be appropriate for further summary judgment proceedings.

C. Brief History of the Direct-Pay Leasing Provisions

To understand Defendants' accounting obligations with respect to direct-pay leases, it is necessary to understand, at least in overview, how direct-pay leases evolved and Interior's involvement

with respect to those leases. As this Court is aware, allotment of lands began in the mid-1800s and proceeded after the passage of the General Allotment Act of 1887, ch. 119, 24 Stat. 388 (Feb. 8, 1887) (Statutory Compilation, Tab 18).[2] Under this and other similar statutes, tribal reservations were divided into individual allotments, which were granted to individual Indians, and "surplus" lands that were sold. The initial intent was that each individual would live on his or her allotment, and therefore the General Allotment Act prohibited leasing of the allotments. See id. Sec. 5, 24 Stat. at 389.

By 1891, however, Congress had recognized that not all allottees would be able to make their own allotments productive. Therefore, Congress authorized Interior to lease to a third party the allotment of any individual who "by reason of age or other disability . . . can not personally and with benefit to himself occupy or improve his allotment or any part thereof . . . ." Chap. 383, 26 Stat. 794, 795 (Feb. 28, 1891) (Statutory Compilation, Tab 22). This authority was extended periodically thereafter. See, e.g., Chap. 290, 28 Stat. 286, 305 (Aug. 15, 1894) (Statutory Compilation, Tab 25); Chap. 3, 30 Stat. 62, 85 (June 7, 1897) (Statutory Compilation, Tab 29); Chap. 598, 31 Stat. 221, 229 (May 31, 1900) (Exhibit A, Tab 31A).[3]

Beginning in the late 1890s, Congress began to authorize selected groups of allottees to lease

---

[2]Statutory Compilation refers to Exhibits 20 and 21 to Defendants' First Phase II Motion for Summary Judgment.

[3]Exhibit A is a compilation of additional statutes not included in the Statutory Compilation previously submitted to this Court. For the Court's convenience, the tabs in Exhibit A have been numbered so that the statutes can be inserted into the Statutory Compilation so that all the relevant statutes will appear in chronological order.

their allotments, subject to the regulations of the Indian Department.[4] By 1910, widespread leasing of allotments was permitted. Pub. L. 61-312, Chap. 431, Sec. 4, 36 Stat. 855, 856-57 (June 25, 1910) (Statutory Compilation, Tab 39).[5]

Initially, moneys from rents, leases, and sales of property belonging to individual Indians were paid either to the individual owner or to the agent. When received by an agent, the income was to be "accounted for as other funds, and paid, upon proper vouchers, directly to the Indians to whom they belong." Regulations of the Indian Office Effective April 1, 1904, 52 (1904) (Exhibit B, Tab 1). By 1906, however, Interior was requiring that all income from leases on allotments owned by members of the Five Civilized Tribes be paid to the United States rather than directly to the allotment owners. Regulations Governing the Leasing and Sale of Lands Allotted to or Inherited by Full-Blood Indians of the Five Civilized Tribes, Sec. 24 (July 7, 1906) (Exhibit B, Tab 2).

As late as 1916, many allotment owners could still lease their allotments and receive and collect payments directly. See, e.g., Regulations Governing the Leasing of Allotted Indian Lands for Farming and Grazing Purposes, page 4, ¶ 3 (July 1, 1916) (Exhibit B, Tab 3). By about 1921, however,

---

[4]See, e.g., Chap. 3, 30 Stat. 62, 72 (June 7, 1897) (Statutory Compilation, Tab 29); Chap. 598, 31 Stat. 221, 246 (May 31, 1900) (Exhibit A, Tab 31A); Pub. L. 57-200, Chap. 1323, Sec. 17, 32 Stat. 500, 504 (June 30, 1902) (Exhibit A, Tab 32A); Pub. L. 57-241, Chap. 1375, Sec. 72, 32 Stat. 716, 726 (July 1, 1902) (Exhibit A, Tab 32B); Pub. L. 59-129, Ch. 1876, Sec. 19, 34 Stat. 137, 144 (Apr. 26, 1906) (Exhibit A, Tab 33A); Pub. L. 59-154, Chap. 2285, 34 Stat. 1015, 1034 (Mar. 1, 1907) (Exhibit A, Tab 36); Chap. 153, 35 Stat. 95, 97 (Apr. 30, 1908) (Statutory Compilation, Tab 38).

[5]See also Pub. L. 60-316, Chap. 263, 35 Stat. 781, 783 (Mar. 3, 1909) (Exhibit A, Tab 38A) (providing that "lands allotted in severalty" except those of the Five Civilized Tribes and the Osage, "may by said allottee be leased for mining purposes for any term of years as may be deemed advisable by the Secretary of the Interior . . . .").

Interior's regulations required that certain lease payments be made to the United States rather than directly to allotment owners. See, e.g., Regulations Governing Leasing Restricted Allotted Indian Lands for Mining Purposes, ¶ 13 (Mar. 19, 1921) (Exhibit B, Tab 3) ("All rents, royalties, and other payments due under leases which have been or may be approved by the Secretary of the Interior shall be paid to the officer in charge . . . .").[6]

The requirement that certain lease income be paid to the United States and then forwarded to the individual Indians remained in place until 1947. At that time, two forces were at work within the Bureau of Indian Affairs ("BIA"). First, BIA was in the process of trying to foster individual access and responsibility for IIM accounts. As described by the Commissioner of Indian Affairs several years later, BIA had developed and begun to implement a "basic policy of gradually withdrawing its supervision over Indian affairs and transferring to the Indians an increasing measure of responsibility for decisions affecting their lives and welfare . . . ." Annual Report of the Secretary of the Interior for the Fiscal Year Ending June 30, 1951, at 352-353 (1951) (Exhibit D). Second, at the same time, BIA was facing increasing difficulties in meeting its obligations within the limited budgets provided by Congress. See, e.g., Hearings on Interior Department Appropriation Bill for 1954, 83rd Cong., 1st Sess. at 860 (Mar. 18, 1953) (Exhibit E) ("It is just impossible for the present manpower to make a dent in the backlog and keep the current work flowing.").

In response to these trends, in 1947, BIA amended its regulations to provide that individual

[6]It appears that direct pay leases were still permitted for some leases even after this time. See, e.g., Regulations Governing the Leasing of Indian Allotted and Tribal Lands for Farming, Grazing, and Business Purposes, ¶ 4 (May 9, 1929) (Exhibit 2, Tab 4A).

allotment owners could negotiate their own farming and grazing leases and that the rentals due "shall be paid by the lessee of the land directly to the adult owners of the land or the parents of the minor owners of the land except when the lease . . . provides otherwise." Secretarial Order No. 23 42 amending Section 171.4 of Title 25 of the Code of Federal Regulations (July 1, 1947) (Exhibit B, Tab 4). Although such leases had to be approved by Interior, once approved, the regulations made no requirement that the lessee report payments or otherwise notify Interior whether payments had been made under the leases. In short, in the circumstance of a "direct-pay" lease, the individual allotment owner negotiated the terms of the lease, arranged for payment directly to him or herself, and Interior was not informed of payments after the lease was approved.[7] Direct-pay leases have been authorized by the regulations since 1947.[8]

In modern times, direct pay leases are an example of Interior's effort to balance two important policy goals: fulfilling the trust obligations and encouraging self-determination. The need for this balance was aptly described by Assistant Secretary Gover when he testified in the Phase I trial about a circumstance in which he had been asked to waive the regulation requiring trust property to be leased at fair market value:

> I mean, I am not like an Indian a hundred years ago, and have the ability to do my own business. That's true for many, many of the people who have interest in allotments.

---

[7]From its inception, the direct-pay authority permitted the individual allotment owner to negotiate a lease that provided for payment to the United States instead of the allotment owner. See authorities cited infra note 8.

[8]The direct-pay regulations have only been amended a few times over the time they have been in effect, and therefore, from year to year the language of the regulations is largely identical. See, e.g., Exhibit B, Tabs 5-53. Interior is currently considering a draft proposed regulation that would eliminate the direct pay option for leasing.

> And that creates a real challenge for us. I've actually had an example in the past week.
>
> By regulation, we have to lease -- issue grazing leases at fair market value. I have the authority to waive that regulation. A tribal leader came to me and said, "Look, we want to encourage more Indians to get involved in cattle operations, and so we want to issue grazing leases for less than market in order to give it to them, get them in business and give them something of an advantage."
>
> My realty staff is saying, "No, no, no. Don't do that because 10 years from now they're going to sue us. They're going to sue us for the difference in fair market value and what you approved." In fact, I did deny it the first time it came to me. And the tribal chairman visited with me and wrote me another letter, and I approved it because I just think it's inappropriate for me to be so paternalistic as to tell a tribe, "No, you can't do that sort of thing."
>
> We have the same thing happen at the level of the individual allottee. An allottee who owns some parcel of land may say, "I would like my nephew to be the one to graze this land, and I would like to give him a break on the grazing rights."
>
> We ought to be able to do that. It requires a reg waiver. It has to come to the Assistant Secretary to do something like that. But I think we ought to be able to do that. And the reason is, the trust has to evolve. It can't be what it was in 1890. That would be ridiculous. The tribes, and many Indian people, are very sophisticated. They may have more qualifications than the people in the Bureau of Indian Affairs who are reviewing their transactions, and it's silly. And yet somehow we have to find a balance between our legal obligations and our role as a trustee, and at the same time not be patronizing and not interfere with people who are perfectly capable of making their own decisions.

Testimony of Kevin Gover, Cobell v. Babbitt, Tr. 906-907 (June 17, 1999).

II. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is properly granted when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any, show that there are no genuine issues of material fact and that the movant is entitled to prevail as a matter of law. Fed. R. Civ. P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Palestine Information Office v. Shultz, 853 F.2d 932, 944 (D.C. Cir. 1988). Once the moving party demonstrates that there are no issues of material fact, the nonmoving party must “make a showing sufficient to establish the existence of an element essential

to that party's case, and on which that party will bear the burden of proof at trial" in order to avoid summary judgment. Celotex Corp., 477 U.S. at 317. To do so, the nonmoving party cannot rely on "mere allegations." Fed. R. Civ. P. 56(e); Celotex Corp., 477 U.S. at 322 n.3; Palestine Information Office, 853 F.2d at 944 (quoting 10A Wright & Miller). He must provide "significant probative" evidence for a reasonable jury to return a verdict in his favor. Id.; see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Laningham v. United States Navy, 813 F.2d 1236, 1242 (D.C. Cir. 1987). "If the evidence is merely colorable, . . . or is not sufficiently probative . . . , summary judgment may be granted." Liberty Lobby, 477 U.S. at 249-50 (citations omitted).

Importantly, disagreement regarding the legal effect of facts is not a "genuine issue of material fact" but is rather an issue of law properly determined by the court. In other words, if the parties do not differ over the material facts, but only dispute the conclusions to be drawn from them, a trial does not serve a useful purpose, particularly in a case which is to be tried to a judge. Klausner v. Ferro, 604 F. Supp. 1188, 1192-93 (E.D. N.Y. 1985), aff'd, 788 F.2d 3 (2d Cir. 1986).

Moreover, "[d]espite the presumption in favor of the non-moving party, the Court must bear in mind that the purpose of Rule 56 is to eliminate the needless delay and expense of unnecessary trial." Miccosukee Tribe of Indians of Florida v. United States, 980 F. Supp. 448, 459 (S.D. Fla. 1997) (citing Celotex Corp., 477 U.S. at 322-23), aff'd, 163 F.3d 1359 (11th Cir. 1998). Thus, summary judgment is proper "if the movant can demonstrate that trial would be useless in that more evidence than is already available in connection with its motion could not reasonably be expected to change the result." Uintah Ute Indians of Utah v. United States, 28 Fed. Cl. 768, 783 (1993) (citing Pure Gold, Inc. v. Syntex (U.S.A.), Inc., 739 F.2d 624, 626 (Fed. Cir. 1984). This motion is particularly

appropriate as it raises only issues of law and will serve to narrow and define the issues remaining for discovery and trial in this litigation.

III. ARGUMENT

Plaintiffs contend that Defendants owe an obligation to account for funds that never came into Defendants' hands, such as funds paid directly to allotment owners by the lessees. The plain language of the 1994 Reform Act reveals that Defendants must account only for funds "held in trust . . . which are deposited or invested pursuant to the Act of June 24, 1938 (25 U.S.C. 162a)." 25 U.S.C. § 4011(a). Therefore, the 1994 Reform Act does not require Defendants to account for such funds.

Plaintiffs attempt to evade the plain language and structure of the 1994 Reform Act by claiming that the obligation to account for funds never actually held in trust derives from the common law. This contention too must fail. The Supreme Court has made it clear in Mitchell II that fiduciary obligations attach when "the Federal Government takes on or has control or supervision over tribal monies or properties . . . ." Therefore, because the United States does not control moneys that are not held in trust, the United States has no obligation to account for those monies.

In short, as this Court has held, the 1994 Reform Act "requires defendants to provide plaintiffs an accurate accounting of all money in the IIM trust held in trust for the benefit of plaintiffs, without regard to when the funds were deposited." Cobell v. Babbitt, --- F. Supp. 2d --- 1999 WL 1581470 *1 (D. D.C. Dec. 21, 1999). Funds that were never received by the United States, particularly those paid directly to the allotment owners, are not "held in trust" or "deposited" by Defendants and, therefore, not subject to the accounting duty declared by this Court. For these reasons, Defendants are entitled to summary judgment that neither the 1994 Reform Act nor any other authority requires

Defendants to account for funds never received by the United States, such as funds paid by lessees directly to the allotment owners.

A. The Plain Language and Structure of the 1994 Reform Act Establish that the Accounting Obligations in the 1994 Reform Act Apply Only to Funds Deposited or Invested Pursuant to the Act of 1938

1. The Plain Language of the Statute Confirms that the 1994 Reform Act Applies Only to Funds Deposited or Invested Pursuant to the Act of 1938

This Court has held that "plaintiffs' substantive rights are created by–and therefore governed by–statute." Cobell v. Babbitt, --- F. Supp. 2d --- 1999 WL 1581470 *29 (D.D.C. Dec. 21, 1999). Thus, the starting point in analyzing Plaintiffs' assertion that Defendants must account for money never held in trust by the United States is the language of the statute in question, the 1994 Reform Act. See, e.g., Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997) ("Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. Our inquiry must cease if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'") (quoting United States v. Ron Pair Enterps., Inc., 489 U.S. 235, 240 (1989)).

Plaintiffs' claim that Defendants must account for monies never received by the United States, such as the income paid directly to allotment owners, has no support in the plain language of the 1994 Reform Act. Plaintiffs assert that Defendants' obligation to provide an accounting can be found in three provisions of the 1994 Reform Act: 25 U.S.C. §§ 4011, 162a(d), and 4043. See, e.g., Plaintiffs' Answer to Corrected Petition to Appeal at 18-19, Cobell v. Babbitt, No. 00-8001 (D.C. Cir. Jan. 13, 2000) (identifying the "duty codified in the 1994 Act" as the duty to "provide an accurate and fair

accounting," which appears to be an excerpt of language in 25 U.S.C. § 4011);[9] Plaintiffs' Response to Defendants' Motion to Dismiss the Equitable Action to Determine Accurate Account Balances at 10, Cobell v. Babbitt, Civ. No. 96-1285 (D. D.C. Aug. 20, 1998). As demonstrated in Defendants' First Phase II Motion for Partial Summary Judgment, these provisions do not impose an obligation to perform a retrospective accounting beyond that necessary to meet the prospective obligations imposed by the 1994 Reform Act. Even assuming that a retrospective accounting obligation were found in those provisions, however, examination of each of these sections reveals that the 1994 Reform Act imposes no duty to account for funds other than those actually held in trust and deposited or invested in accordance with 25 U.S.C. § 162a.

First, 25 U.S.C. § 4011 requires Interior to "[a]ccount for the daily and annual balance of all funds held in trust by the United States for the benefit of an . . . individual Indian which are deposited or invested pursuant to the Act of June 24, 1938 (25 U.S.C. § 162a)." 25 U.S.C. § 4011(a) (emphasis added). By its plain language, therefore, this provision can not be construed to apply to income that never comes within the possession of Interior because those funds are not and never were "held in trust" or "deposited or invested pursuant to the Act of June 24, 1938."[10]

Second, the plain language of 25 U.S.C. § 162a(d) addresses only funds actually held in trust. For instance, one subsection requires reporting on "trust fund balances," while other subsections require

---

[9]Plaintiffs' Answer to Corrected Petition for Appeal was attached as Exhibit 15 to Defendants' First Phase II Motion for Partial Summary Judgment.

[10]It is important to note that the plain language of this provision requires the funds to both be "held in trust" and "deposited or invested" pursuant to the Act of June 24, 1938. In other words, non-trust funds (such as forest fees or other money due and owing to the United States) do not become subject to the accounting requirements simply because they are invested jointly with the trust funds.

Interior to provide "periodic, timely reconciliations to assure the accuracy of accounts" and determine "accurate cash balances." 25 U.S.C. § 162a(d)(1), (3), (4). Money paid directly to an individual is never part of any "fund" or "cash" balances maintained by Interior. The plain language of each of these provisions is directed at funds under Defendants' control, not at identifying funds that never entered the possession of the United States.

Finally, 25 U.S.C. § 4043, upon which Plaintiffs rely for a source of the duty to account, merely provides that one of the duties of the Special Trustee is to "monitor the reconciliation of tribal and Individual Indian Money trust accounts to ensure that the Bureau provides the account holders, with a fair and accurate accounting of all trust accounts." Id. § 4043(b)(2)(A). Even if this provision somehow did more than place monitoring obligations on the Special Trustee, it explicitly applies only to "trust accounts,"[11] and not to funds that never entered the possession of the United States.

Thus, the plain language of the 1994 Reform Act imposes no obligation to account for funds not actually held by the United States and deposited or invested pursuant to the Act of June 24, 1938 (25 U.S.C. § 162a). As such, Defendants are entitled to summary judgment that the 1994 Reform Act imposes no duty to account for monies never held in trust, such as monies paid directly to the allotment owners and never held, deposited or invested by the United States.[12]

---

[11]As set forth in more detail in Defendants' First Phase I Motion for Partial Summary Judgment, at 24-31, this language does not impose an obligation to perform any particular accounting–such as an accounting for funds never received by Defendants. Rather, Section 4043 requires the Special Trustee to monitor the reconciliation that BIA determines to be necessary and appropriate.

[12]As discussed more fully in Defendants' First Phase II Motion for Partial Summary Judgment at 8-12 and 33-36, the accounting for IIM funds prior to 1994 was governed by three statutes. These three statutes, however, cannot be read to impose an obligation to account for funds never held by the United States. Between 1947 and 1950, accounting for IIM funds was governed by the Budget and

2. The Statutory Structure Confirms the Plain Language of the Statute

Other provisions of the 1994 Reform Act confirm that Congress intended to distinguish between circumstances in which Interior obtains control, and therefore liability, for trust funds and circumstances in which those funds are beyond the control of the agency. Specifically, in the 1994 Reform Act, Congress granted new authority to the tribes, which permitted the withdrawal of trust funds so that the tribes could manage their own money. Thus, pursuant to 25 U.S.C. § 4022, if a Tribe withdraws its trust funds from the U.S. Treasury and takes on management of those funds, any trust responsibility or liability of the United States for such withdrawn tribal funds ceases as of the date the funds are withdrawn. Thus, once tribal trust funds are removed from the management of the United States, they no longer retain trust status and Congress imposes no obligation to account for the funds not actually held in trust.

In discussing this provision, the legislative history makes a clear distinction between the situation in which the Bureau of Indian Affairs ("BIA") has control and therefore responsibility for funds and the situation in which BIA has no such control:

Accounting Act which required the General Accounting Office to "receive and examine . . . all accounts relating to . . . Indians . . . and certify the balances arising thereon . . . ." Pub. L. No. 67-13, Chap. 18, Sec. 304, 42 Stat. 20, 23-24 (June 10, 1921) (Statutory Compilation, Tab 49). In other words, the plain language of this statute was limited to the funds for which Interior had "balances." If the funds were never held, there would be no balance to certify. Between 1950 and 1994, accounting for IIM funds was governed by the Accounting and Auditing Act of 1950, which provided that accounting would be performed in accordance with regulations promulgated by Interior in conformity to the requirements of the General Accounting Office. See Pub. L. 81-784, Chap. 946, Sec. 113(b), 64 Stat. at 836 (1950). The leasing regulations and the IIM regulations contained no requirement for Interior to account for funds paid directly to the allotment owners. See Exhibit B, Tabs 5-53. Therefore, prior to 1994, no statute or regulation required Interior to account for funds never held by the United States.

> The Committee was concerned about the Secretary's liability towards funds taken out of the BIA and directly managed by the Indian tribes . . . The Committee amendment provides that all funds taken out of the BIA for direct management by Indian tribes be taken out of trust status. The Committee intends that all liability to those funds as to the future handling of such funds ceases. However, the Committee does not intend that the trust responsibility or liability for the management of such funds while under the control of the BIA should cease. . . .

American Indian Trust Fund Management Reform Act of 1994, H. R. Rep. 103-778, 1994 U.S.C.C.A.N. 3467, 3471 (Oct. 3, 1994) (Legislative History Compilation, Tab 10) (emphasis added).[13]

The lease income paid directly to allotment owners is analogous to the tribal funds discussed in 25 U.S.C. § 4022 and its legislative history. Just as, after withdrawal, BIA has no control and therefore no liability for the management of the withdrawn tribal funds, BIA has no control over the funds paid directly to the allotment owners and, therefore, no liability for the management of such funds.[14] Certainly, if BIA has no obligation for tribal money previously held in trust but now under the control of the tribes, it is even clearer that the agency has no obligation to account for individual Indian monies never actually held in trust.

C. The Plain Language of the 1994 Reform Act is Supported by the Indian Trust Principles Announced by Such Cases as Mitchell II.

---

[13]The Legislative History Compilation was attached as Exhibits 17, 18, and 19 to Defendants' First Phase I Motion for Partial Summary Judgment.

[14]Because Plaintiffs have expressly excluded questions of asset management from this litigation (see Complaint ¶ 5), as they must, Defendants do not address the question of what obligation, if any, BIA may bear to ensure that lease payments are actually made when the lease provides for direct payment. The question presented in this case, and therefore this Motion, is simply what responsibility BIA has to account for funds. See Defendants' First Motion for Partial Summary Judgment at 36-45 (describing the jurisdictional limits on the claims that can be presented in this action).

Plaintiffs may contend that the duty to account for funds never received by the United States can be found in the "common law" definition of an accounting. As this Court has held, however, to the extent that the common law is relevant to this action, it is as an aid to the interpretation of the 1994 Reform Act. Cobell v. Babbitt, --- F. Supp. 2d --- 1999 WL 1581470 *30 (D. D.C. Dec. 21, 1999). As demonstrated above, the plain language and structure of the Act are unambiguous and, therefore, resort to common law is unnecessary and improper. United States v. Gonzales, 520 U.S. 1, 7 (1997) (quoting United States v. Wiltberger, 18 U.S. 76, 95-96 (1820) (Marshall, C.J.)) ("'Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed, which would justify a court in departing from the plain meaning of words . . . in search of an intention which the words themselves did not suggest.'").

Even were a reference to common law warranted, however, Plaintiffs' contention that Defendants must account for funds never in the possession of the United States must fail. An analysis of the appropriate case law reveals that no fiduciary obligation attaches to funds that are never "held" by, "deposited or invested" by, or controlled by Defendants.

In United States v. Mitchell (II), 463 U.S. 206, 225 (1983), the Supreme Court found that fiduciary obligations attach when "the Federal Government takes on or has control or supervision over tribal monies or properties . . . ." (citation omitted); see also United States v. Cherokee Nation of Oklahoma, 480 U.S. 700, 707 (1987). In other words, fiduciary obligations attach when the United States takes control over Indian moneys. If money is paid directly from the lessee to the owner of the allotment, the United States never receives control over the money and, therefore, no fiduciary obligation attaches. Cf. Nero v. Cherokee Nation of Oklahoma, 892 F.2d 1457, 1465 (10th

Cir.1989) (finding that there was no fiduciary obligation for Interior to intervene in Cherokee elections on the basis that Mitchell II can be "distinguished . . . as a case involving federal statutes and regulations requiring government action with respect to *a specific trust corpus*." (emphasis added)).

Such a conclusion is entirely consistent with other cases interpreting the United States' trust obligations. As the Court of Claims recognized, the "trust or fiduciary relationship plaintiff has with the Government arises not from the specific terms of a document; it exists because defendant has assumed control and supervision over plaintiffs' money and property." American Indians Residing on Maricopa-Ak Chin Reservation v. United States, 667 F.2d 980, 990 (Ct. Cl. 1981). In the context of that relationship, the Government must "account for all Indian money that is in its hands . . . ." Id. at 1002. If, however, the money is not within the control of the United States, there is no obligation to account for those funds. Id. at 1003 ("If complete control of tribal organization funds in fact has been transferred to the tribe, the Government is not required to account.").

Moreover, such a conclusion is consistent with this Court's prior holdings. In making its declarations at the conclusion of the Phase I trial, this Court found that the 1994 Reform Act "requires defendants to provide plaintiffs an accurate accounting of all money in the IIM trust held in trust for the benefit of plaintiffs, without regard to when the funds were deposited." Cobell v. Babbitt, --- F. Supp. 2d --- 1999 WL 1581470 *1 (D. D.C. Dec. 21, 1999). Funds that were never received by the United States, particularly those paid directly to the allotment owners, are not "held in trust" by Defendants and, therefore, not subject to the accounting duty declared by this Court.

IV. CONCLUSION

Defendants are entitled to summary judgment that the 1994 Reform Act does not impose an obligation to account for funds never held in trust and deposited or invested pursuant to the Act of June 24, 1938, such as funds paid directly to individual Indians.

Dated: November 22, 2000

Respectfully submitted

LOIS J. SCHIFFER
Assistant Attorney General

CHARLES W. FINDLAY
Assistant Chief
PHILLIP A. BROOKS
DAVID F. SHUEY
Senior Counsel
BRIAN L. FERRELL
SARAH D. HIMMELHOCH
Trial Attorneys
Department of Justice
Environment & Natural Resources Division
General Litigation Section
P.O. Box 663
Washington, D.C. 20044-0663

OF COUNSEL:

Edith R. Blackwell
Department of the Interior
Office of the Solicitor

Walter Eccard
Department of the Treasury
Office of General Counsel

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this _____ day of May, 2000, copies of the

foregoing **United States' Second Phase II Motion for Partial Summary Judgment (Re: Funds Not Deposited or Invested Pursuant to the Act of 1938), supporting memorandum, statement of undisputed facts, proposed order, and exhibits** were served on the following by hand-delivering a copy to the following counsel:

Dennis M. Gingold, Esq.
Mark Kester Brown, Esq.
1275 Pennsylvania Avenue, N.W.
9th Floor
Washington, D.C. 20004
Fax: (202) 637-0497

Keith Harper, Esq.
Lorna Babby, Esq.
Native American Rights Fund
1712 N Street NW
Washington, D.C. 20036-2976
Fax: (202) 822-0068

and by placing a copy in the United States mail, first-class postage prepaid, addressed as follows:

Thaddeus Holt, Esq.
P.O. Box 440
Point Clear, AL 36564

Elliott H. Levitas
1100 Peachtree St, Ste. 2800
Atlanta, GA 30309-4530

Paula Clinedinst

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil No. 96-1285
	)	(RCL)
BRUCE BABBITT, Secretary of the Interior, et al.	)	
	)	
	)	
Defendants.	)	
	)	

STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF
DEFENDANTS' SECOND PHASE II MOTION FOR
PARTIAL SUMMARY JUDGMENT
(RE: FUNDS NOT DEPOSITED OR INVESTED PURSUANT TO
THE ACT OF JUNE 24, 1938)

Pursuant to Federal Rule of Civil Procedure 56 and Local Rule 56.1, the Defendants state the following undisputed facts in support of their Motion for Summary Judgment:

1. Plaintiffs contend that Defendants must account for funds never received or invested by Defendants, such as funds paid directly from lessees to owners of allotments. Plaintiffs' Supplemental Contention Answers on Behalf of Class to Defendants' Fourth Set of Interrogatories, Requests for Admission and Requests for Production Dated October 15, 1999, Response to Interrogatory 11 (Jan. 31, 2000).[15]

2. Allotment of lands began in the mid-1800s and proceeded after the passage of the

[15]Plaintiffs' discovery responses were attached as Exhibit 3 to Defendants' First Phase II Motion for Partial Summary Judgment.

General Allotment Act of 1887, ch. 119, 24 Stat. 388 (Feb. 8, 1887) (Statutory Compilation, Tab 18).[16] Under this and other similar statutes, tribal reservations were divided into individual allotments, which were granted to individual Indians, and "surplus" lands that were sold. The initial intent was that each individual would live on his or her allotment, and therefore the General Allotment Act prohibited leasing of the allotments. See id. Sec. 5, 24 Stat. at 389.

2. By 1891, however, Congress had recognized that not all allottees would be able to make their own allotments productive. Therefore, Congress authorized Interior to lease to a third party the allotment of any individual who "by reason of age or other disability . . . can not personally and with benefit to himself occupy or improve his allotment or any part thereof . . . ." Chap. 383, 26 Stat. 794, 795 (Feb. 28, 1891) (Statutory Compilation, Tab 22). This authority was extended periodically thereafter. See, e.g., Chap. 290, 28 Stat. 286, 305 (Aug. 15, 1894) (Statutory Compilation, Tab 25); Chap. 3, 30 Stat. 62, 85 (June 7, 1897) (Statutory Compilation, Tab 29); Chap. 598, 31 Stat. 221, 229 (May 31, 1900) (Exhibit A, Tab 31A).[17]

3. Beginning in the late 1890s, Congress began to authorize selected groups of allottees to lease their allotments, subject to the regulations of the Indian Department.[18] By 1910, widespread

---

[16]Statutory Compilation refers to Exhibits 20 and 21 to Defendants' First Phase II Motion for Summary Judgment.

[17]Exhibit A is a compilation of additional statutes not included in the Statutory Compilation previously submitted to this Court. For the Court's convenience, the tabs in Exhibit A have been numbered so that the statutes can be inserted into the Statutory Compilation so that all the relevant statutes will appear in chronological order.

[18]See, e.g., Chap. 3, 30 Stat. 62, 72 (June 7, 1897) (Statutory Compilation, Tab 29); Chap. 598, 31 Stat. 221, 246 (May 31, 1900) (Exhibit A, Tab 31A); Pub. L. 57-200, Chap. 1323, Sec. 17, 32 Stat. 500, 504 (June 30, 1902) (Exhibit A, Tab 32A); Pub. L. 57-241, Chap. 1375, Sec. 72, 32

leasing of allotments was permitted. Pub. L. 61-312, Chap. 431, Sec. 4, 36 Stat. 855, 856-57 (June 25, 1910) (Statutory Compilation, Tab 39).[19]

4. Initially, moneys from rents, leases, and sales of property belonging to individual Indians were paid either to the individual owner or to the agent. When received by an agent, the income was to be "accounted for as other funds, and paid, upon proper vouchers, directly to the Indians to whom they belong." Regulations of the Indian Office Effective April 1, 1904, 52 (1904) (Exhibit B, Tab 1).

5. By 1906, however, Interior was requiring that all income from leases on allotments owned by members of the Five Civilized Tribes be paid to the United States rather than directly to the allotment owners. Regulations Governing the Leasing and Sale of Lands Allotted to or Inherited by Full-Blood Indians of the Five Civilized Tribes, Sec. 24 (July 7, 1906) (Exhibit B, Tab 2).

6. As late as 1916, however, many allotment owners could still lease their allotments and receive and collect payments directly. See, e.g., Regulations Governing the Leasing of Allotted Indian Lands for Farming and Grazing Purposes, page 4, ¶ 3 (July 1, 1916) (Exhibit B, Tab 3).

7. By about 1921, Interior's regulations required that more lease payments be made to the United States rather than directly to allotment owners. See, e.g., Regulations Governing Leasing Restricted Allotted Indian Lands for Mining Purposes, ¶ 13 (Mar. 19, 1921) (Exhibit B, Tab 3) ("All

---

Stat. 716, 726 (July 1, 1902) (Exhibit A, Tab 32B); Pub. L. 59-129, Ch. 1876, Sec. 19, 34 Stat. 137, 144 (Apr. 26, 1906) (Exhibit A, Tab 33A); Pub. L. 59-154, Chap. 2285, 34 Stat. 1015, 1034 (Mar. 1, 1907) (Exhibit A, Tab 36); Chap. 153, 35 Stat. 95, 97 (Apr. 30, 1908) (Statutory Compilation, Tab 38).

[19]See also Pub. L. 60-316, Chap. 263, 35 Stat. 781, 783 (Mar. 3, 1909) (Exhibit A, Tab 38A) (providing that "lands allotted in severalty" except those of the Five Civilized Tribes and the Osage, "may by said allottee be leased for mining purposes for any term of years as may be deemed advisable by the Secretary of the Interior . . . .").

rents, royalties, and other payments due under leases which have been or may be approved by the Secretary of the Interior shall be paid to the officer in charge . . . .").

8. The requirement that certain lease income be paid to the United States and then forwarded to the individual Indians remained in place until 1947. At that time, BIA was in the process of trying to foster individual access and responsibility for IIM accounts. As described by the Commissioner of Indian Affairs several years later, BIA had developed and begun to implement a "basic policy of gradually withdrawing its supervision over Indian affairs and transferring to the Indians an increasing measure of responsibility for decisions affecting their lives and welfare . . . ." Annual Report of the Secretary of the Interior for the Fiscal Year Ending June 30, 1951, at 352-353 (1951) (Exhibit D).

9. In addition, at the same time, BIA was facing increasing difficulties in meeting its obligations within the limited budgets provided by Congress. See, e.g., Hearings on Interior Department Appropriation Bill for 1954, 83rd Cong., 1st Sess. at 860 (Mar. 18, 1953) (Exhibit E) ("It is just impossible for the present manpower to make a dent in the backlog and keep the current work flowing.").

10. In response to these trends, in 1947, BIA amended its regulations to provide that individual allotment owners could negotiate their own farming and grazing leases and that the rentals due "shall be paid by the lessee of the land directly to the adult owners of the land or the parents of the minor owners of the land except when the lease . . . provides otherwise." Secretarial Order No. 23 42 amending Section 171.4 of Title 25 of the Code of Federal Regulations (July 1, 1947) (Exhibit B, Tab 4). Although such leases had to be approved by Interior, once approved, the regulations made no

requirement that the lessee report payments or otherwise notify Interior whether payments had been made under the leases.[20]

13. Direct-pay leases have been authorized by the regulations since 1947.[21]

Dated: November 22, 2000

Respectfully submitted

LOIS J. SCHIFFER
Assistant Attorney General

CHARLES W. FINDLAY
Assistant Chief
PHILLIP A. BROOKS
DAVID F. SHUEY
Senior Counsel
BRIAN L. FERRELL
SARAH D. HIMMELHOCH
Trial Attorneys
Department of Justice
Environment & Natural Resources Division
General Litigation Section
P.O. Box 663
Washington, D.C. 20044-0663

OF COUNSEL:

Edith R. Blackwell
Department of the Interior
Office of the Solicitor

Walter Eccard
Department of the Treasury
Office of General Counsel

[20]From its inception, the direct-pay authority permitted the individual allotment owner to negotiate a lease that provided for payment to the United States instead of the allotment owner. See authorities cited infra note 8.

[21]See, e.g., Exhibit B, Tabs 5-53.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil No. 96-1285
	)	(RCL)
BRUCE BABBITT, Secretary of the Interior, et al.	)	
	)	
	)	
Defendants.	)	
	)	

ORDER

Upon consideration of the motions and papers of counsel, and the record herein, the Court finds that the American Indian Trust Fund Management Reform Act of 1994 ("the 1994 Reform Act") does not require the Department of the Interior to account for funds never held in trust and deposited or invested pursuant to the Act of June 24, 1938. See 25 U.S.C. § 4011(a). Accordingly, the court HEREBY ORDERS that the Defendants' Second Phase II Motion For Partial Summary Judgment (Re: Funds Not Deposited or Invested Pursuant to The Act of June 24, 1938) is GRANTED.

Date _____

_____
Royce C. Lamberth,
District Judge